IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1615 OF 2005
IN
COUNTER CLAIM (STAMP) NO.2508 OF 2004
IN
SUMMARY SUIT NO.1330 OF 2000

Kanayalal M. Thakkar Plaintiff

versus

Shree Padmanabh Builders Defendants

Mr.Abhay Patki i/by K.P.Gala & Asociates for plaintiff.

Mr.M.S.Rane i/by Purnanand & Co. for defendants.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 22nd July 2005

PC :

1. This is a notice of motion by the defendants in their counter claim.

2. The original plaintiffs have filed a suit for a declaration that the defendant does not have any right, title and interest in respect of the additional FSI that may be available in respect of suit property, in excess of 2455 sq.ft. already consumed by the defendant, under the agreement dated 1st October 1989 and that they

have no right to enter into any agreement for sale of the units beyond 2455 sq. fts. granted under the agreement dated 1st October 1989. There is a relief of permanent injunction in terms of prayer clause (b) of the plaint and in pursuance of the aforesaid prayers further orders and directions including damages have been claimed. The original plaintiff, it is not disputed, had taken out Notice of Motion in this suit and it is further not in dispute that a statement was recorded in an order passed in the said Notice of Motion that any further construction by the defendant would be done after obtaining leave of this Court.

3. Thereafter, written statement and counter claim has been filed by the defendant in the suit. The counter claim is for exactly opposite relief, namely, the defendant in the suit and plaintiff in the counter claim is entitled to all rights and benefits flowing from agreement dated 1st October 1989 and subsequent documents. The defendant to the suit and the plaintiff to the counter claim, seeks relief of specific performance of agreements and other documents referred to in prayer clause (a) of the counter claim.

4. Although, it is contended that the Notice of Motion is taken out pursuant to leave granted by this Court, in my view, the self same documents which were before this Court when the order dated 12th February 2001 was passed, are being relied upon. That apart, the defendant in the suit and the plaintiff to the counter claim contends that he is constructing part 6th floor and complete 7th floor with the help of TDR.. he bases the claim to construct on the strength of documents annexed to the counter claim. Notice of Motion proceeds on the basis that the documents which are relied upon in support of the counter claim demonstrate exclusive right of original defendant in the suit and the plaintiff to the counter claim.

5. After hearing Mr.Patki, I am satisfied that no orders can be granted on the Notice of Motion taken out in the counter claim. The statement of defendant in the suit and the plaintiff to the counter claim is recorded by the Court so as to protect rights of the original plaintiff and preserving status-quo at site. Unless and until it is demonstrated that the original plaintiff has no right, title or interest in the property

and that the original defendant to the suit and plaintiff to the counter claim is entitled to the declarations and reliefs claimed, it will not be possible to grant permission to construct and alienate the property. Even otherwise, there are no changed circumstances warranting modification of the order recording statement of the original defendant passed by this Court. For all these reasons Notice of Motion is dismissed. No order as to costs.

(S.C.DHARMADHIKARI, J.)